King Soopers, Inc. *and* United Food and Commercial Workers, Local Union No. 7. Case 27–CA–16818–1

September 30, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On December 7, 2000, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel and the Charging Party each filed exceptions and supporting briefs, the Respondent filed a brief in answer to the exceptions, and the General Counsel and the Charging Party each filed a reply to the answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

Contrary to our dissenting colleague, we agree with the judge that the Respondent did not violate Section 8(a)(5) of the Act by refusing to deal with George Gonzales as the Union's business agent.

Gonzales was a long-term meat department employee for the Respondent. He also served as a union steward for approximately 13–14 years at the relevant store. On March 6, 1996, Gonzales confronted his supervisor about the Respondent's decision to assign him to work on a Saturday. During this confrontation, Gonzales angrily threw his meathook over his shoulder, narrowly missing an employee. He also threw a 40-pound piece of meat into a saw (breaking its blade); threw his knife into a box; threatened his supervisor; and refused to follow the store manager's order to leave the store.

On March 16, the Respondent terminated Gonzales, based on his threatening and violent behavior. An arbitrator upheld the termination. Relevantly, the arbitrator found that Gonzales's above-described behavior demonstrated not only that he cannot control his temper, but also that he was capable of seriously endangering the safety of the supervisor and the employee who had been present during the confrontation. Finally, the arbitrator found that, a few months before March 1996, Gonzales, while serving in his capacity as union steward, had placed his hand over the store manager's mouth during a discussion with her.

On February 14, 2000, the Union hired Gonzales as a business agent. He was assigned to service several stores, including the one where the above-mentioned confrontation occurred. On March 7, 2000, the Respondent advised the Union that, given the nature of the incident leading to Gonzales' termination (as well as his violent and threatening conduct preceding his termination), it would not deal with him regarding union matters.

Under settled Board law, an employer is justified in refusing to meet with a particular union representative if there is "persuasive evidence that the presence of [that individual] would create ill-will and make good faith bargaining impossible." KDEN Broadcasting Co., 225 NLRB 25, 35 (1976) (emphasis in original).

As the judge found, the Respondent has met this burden. In this regard, uncontroverted evidence demonstrates that Gonzales engaged in volatile and disruptive workplace misconduct on March 6, which gave rise to his termination. This misconduct, which was triggered by a minor scheduling dispute, clearly jeopardized the safety of a supervisor and a fellow employee, and is sufficient to establish that Gonzales' presence would preclude good-faith bargaining.

Thus, in light of Gonzales' egregious misconduct, individuals required to deal with him in a potentially adversarial setting (a grievance meeting, for example) might reasonably be preoccupied with the legitimate concern that he would react violently if his position did not prevail. Such a preoccupation undermines good-faith collective bargaining because it impedes a vigorous exchange of positions unencumbered by the threat of an adversary's violent reaction. In short, Gonzales' propensity to react violently during a confrontation would cast a lingering and threatening shadow over collective bargaining, which must, of course, occur in an atmosphere devoid of violence and threats if it is to succeed. Based on these circumstances, then, we agree with the judge that the Respondent should not be required to deal with Gonzales as a union business agent because his presence would create ill will and would make good-faith bargaining impossible.

Our dissenting colleague contends, principally, that it is unfair to allow the Respondent to refuse to deal with Gonzales because the incident leading to his termination occurred several years ago. Our colleague further argues that Gonzales' nonviolent dealings with employers during his tenure as a shop steward, and later, as a business agent, should negate any concern that his propensity to react violently during a confrontation would repeat itself. These contentions are without merit.

The fact that Gonzales has had nonviolent encounters as a shop steward in the past as well as some nonviolent encounters with employers in his capacity as a business agent is of limited significance in resolving the issue at hand, namely, whether his tendency to react violently

¹ All dates refer to 1996 unless otherwise indicated.

² Gonzales wanted to take the day off to celebrate his birthday.

during a confrontation justifies the Respondent's refusal to deal with him. In brief, neither Gonzales' past behavior nor his behavior as a business agent eliminates the effect of the egregious misconduct which gave rise to his termination. Additionally, our colleague ignores the arbitrator's finding that, a few months before the incident leading to his termination, Gonzales, while acting in his capacity as shop steward, placed his hand over the store manager's mouth during a discussion with her.

Our dissenting colleague concedes, as she must, that the arbitrator upheld Gonzales' termination. Nonetheless, she contends that the incident leading to his termination involved "no actual or intended physical contact, and was purely personal in nature." The absence of intent or actual physical contact is irrelevant in these circumstances, however. Gonzales' behavior was plainly reckless, and although he might have acted without a subjective intent to cause physical injury when he narrowly missed striking an employee with a meathook, this does not mitigate or change how it would reasonably be perceived by bystanders, and thus does not ameliorate the potentially debilitating effect on bargaining.³

Finally, our colleague's reliance on Caribe Staple Co., 313 NLRB 877 (1994), is misplaced. In that case, the respondent attempted to reduce the size of the union's bargaining team from 10 to 4 members, and sought to exclude, among others, an employee who had recently been terminated. Significantly, however, the respondent raised no objection to the participation of that individual at two bargaining sessions after his discharge. In effect, then, in the circumstances of that case, the respondent waived any right to demand his exclusion. By contrast, in the instant case, the Respondent refused to deal with Gonzales as soon as it became aware that he had been assigned to service four of its stores. Further, as the dissent concedes, individual misconduct that undermines good-faith bargaining is not limited to what occurs during bargaining itself. See Sahara Datsun, 278 NLRB 1044, 1046-1047 (1986), enfd. 811 F.2d 1217 (9th Cir. 1987).

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER LIEBMAN, dissenting.

My colleagues' decision to permit the Respondent to seize upon a 4-year old personal incident to justify refusing to deal with George Gonzales as the Union's duly designated representative misapplies precedent and threatens the Act's guarantee that employees will have the right to bargain collectively through representatives of their own choosing. Accordingly, I dissent.

That Gonzales was lawfully discharged for cause in March 1996—after 23 years as a meatcutter and 13 years as union steward in Respondent's store 3—was resolved by an arbitrator and is not in dispute. His termination followed an argument with his department manager in which Gonzales reacted in anger over being scheduled to work on his 50th birthday, for which he had earlier requested leave. Relying on the potential for injury created by an emotional outburst in that workplace environment, and despite Gonzales' otherwise exemplary employment record, an arbitrator upheld his termination. In reaching his decision, the arbitrator made a specific finding that during the exchange, Gonzales was *not* acting in his capacity as steward, but rather was arguing as an affected employee about his own schedule.

My colleagues err in assessing the probable impact of Gonzales' participation in collective bargaining today based solely on a single, remote instance of inappropriate conduct involving a purely personal matter—and directed toward a supervisor with whom Gonzales is unlikely to come into contact.² Far more relevant is the absence of evidence that during Gonzales' many years as union steward, he ever engaged in inappropriate or abusive conduct toward Respondent's representatives. Gonzales' record as steward was essentially unblemished, and he appears to have contributed to a productive collective-bargaining relationship. The evidence shows that, as steward, Gonzales had daily contact with managers and supervisors; engaged in disciplinary interviews and steps 1 and 2 grievance meetings on a weekly basis; discussed and resolved all manner of workplace complaints, employee disputes, and disciplinary proceedings;

³ Our colleague speculates that the Respondent's statement that it would only permit Gonzales to enter its stores "for the sole purpose of shopping" demonstrates that it did not seriously believe that Gonzales posed a threat to others. Contrary to our colleague's contention, the Respondent's statement demonstrates no such thing. The issue here involves the Respondent's refusal to deal with Gonzales as a union business agent, not Gonzales's status as a customer.

¹ While no one suffered any injury as a result of Gonzales' behavior, the arbitrator stressed the importance of an employer's obligation to maintain a safe workplace for all employees. He concluded that the possibility of harm posed by Gonzales' losing his temper in a setting equipped with knives, saws, and meathooks was too high to risk returning him to the job.

² For reasons totally unconnected to the events of this case, the supervisor involved in the 1996 incident transferred to a store that is not among those to which Gonzales has been assigned to serve as business representative.

KING SOOPERS, INC. 271

and participated in negotiations. At no time did Gonzales' behavior become an issue.³

Gonzales' newly-acquired duties as union business representative—which he assumed in February 2000, nearly 4 years after his discharge⁴—included enforcing collective-bargaining agreements, conducting grievance meetings at steps 1 and 2, and counseling employees, all functions closely similar to the duties he carried out appropriately as a steward. From February 23, to March 1, 2000, Gonzales made visits to four different facilities run by the Respondent, including two stops at store 3, the site of his prior representational experience.⁵ In addition to introducing himself to management personnel and employees at these sites, Gonzales also participated in grievance meetings at two locations. There is no evidence that problems of any kind arose, or that anything out of the ordinary occurred, during the course of these visits.

Nevertheless, on March 7, Respondent's attorney notified the Union that the Respondent would not permit Gonzales into its stores for the purpose of dealing with management regarding labor relations, grievances or other union matters. Cited as the basis for its position was the "violent and threatening" conduct that led to Gonzales' termination some four years earlier. The letter nevertheless specifically invited Gonzales to come into its stores as a customer to shop.⁶

Thereafter, on March 10, the manager of Respondent's store 2 declined to set up a step 2 grievance meeting with Gonzales, stating, that he had been directed not to deal with Gonzales. Within days, other managers followed suit, two warning that Gonzales' failure to leave the premises would result in the police being called to remove him. After weeks of discussions between the Respondent and the Union, and despite the written assurance of the union president that Gonzales would comport himself in a professional manner, the Respondent held firm to its refusal to deal with Gonzales as the union representative.

Among the rights guaranteed employees under Section 7 of the Act, is "to bargain collectively through representatives of their own choosing." This guarantee has been construed by the Board to include the union's unilateral right to choose the individuals it wants to act as its agents.⁹ The Act requires an employer to recognize, meet, and deal with whomever the union designates as its representative in collective bargaining. Failure to do so violates an employer's obligation to bargain under Section 8(a)(5), except in rare circumstances. The test is whether there is "persuasive evidence that the presence of the particular individual would create ill will and make good faith bargaining impossible." KDEN, supra, 225 NLRB at 35 (emphasis in original). See also General Electric Co. v. NLRB, 412 F.2d 512 (2d Cir. 1969) (describing exceptions to the right to choose bargaining representative as "rare and confined").

Applying that standard, consistent with the Board's past decisions, I see no basis for the Respondent's refusal to deal with Gonzales. The incident relied on by the Respondent occurred some 4 years earlier, involved no actual or intended physical contact, and was purely personal in nature. The supervisor whose actions triggered Gonzales' misconduct is now working at a store not included within Gonzales' jurisdiction as business representative, so there is no prospect of any lingering personal ill will between the two affecting the bargaining process. As demonstrated, Gonzales' most recent visits to the Respondent's facilities in his role as business agent were professional and productive. The objective evi-

³ Repeated assertions by the majority notwithstanding, there is no competent record evidence to support a finding that Gonzales had demonstrated a "propensity to react violently." My colleagues rely on a reference in the arbitrator's decision in Gonzales' discharge case to a prior incident in which he "placed his hand over the store manager's mouth." This occurred during a discussion about a deli clerk's schedule. It appears that Gonzales placed his hand to the manager's mouth to signal that he wanted an opportunity to respond to the manager's comments. According to the arbitrator's account, when the manager stepped back, Gonzales "immediately apologized." Nothing more came of the matter.

There is no suggestion that Gonzales was violent or out of control during this exchange or that the manager was harmed in any way. The manager involved in that incident did not testify in this proceeding. The only testimony on the subject is Gonzales' answer on cross-examination that he recalled that the issue was discussed in his arbitration decision and that he denied any implication of misconduct. Thus, the majority accords pivotal weight to evidence of scant probative value.

⁴ Gonzales was employed as a meatcutter in other retail grocery stores during the period between his discharge and being hired by the Union.

⁵ Department manager Gallegos, the store manager, and the assistant manager, all of whom had been involved in Gonzales' termination, were no longer working at store 3.

⁶ If the Respondent seriously believed that Gonzales posed a threat to the safety and well being of others, it would seem logical for the Respondent to seek to insulate its customers as well as its managers and employees from such threat.

During the incident that gave rise to his termination, the police were not summoned, and neither a criminal charge nor a civil complaint was filed.

⁸ Union President Duran made this representation in a March 31 letter to Respondent's president. The Respondent did not request further assurances.

⁹ See People Care, Inc., 327 NLRB 814, 824 (1999); Long Island Jewish Medical Center, 296 NLRB 51, 71–72 (1989); Fitzsimons Mfg. Co., 251 NLRB 375, 379 (1980), enfd. 670 F.2d 663 (6th Cir. 1982); KDEN Broadcasting Co., 225 NLRB 25, 35 (1976).

dence here, then, falls far short of the strict standard established by the Board.

The Board's decision in *Caribe Staple Co.*, 313 NLRB 877 (1994), is illustrative. There, the Board affirmed a judge's determination that an employer could not compel the exclusion of the union's representative, a former employee, from contract negotiations even though that individual had been fired just weeks before for having committed repeated physical attacks on his supervisor. Because the misconduct was unrelated to bargaining and involved no member of the employer's negotiating team, good-faith bargaining was not impossible. Id. at 889–890. I am not persuaded by the majority's effort to distinguish *Caribe Staple* by re-rationalizing that decision, and I am aware of no precedent that, on its facts, supports the result here. ¹⁰

For all of these reasons, I would reverse the judge's dismissal of the complaint.

Amadeo E. Ruibal, Esq. and Daniel J. Michalski, Esq., for the General Counsel.

Emily F. Keimig and Patrick R. Scully, Esqs., of Denver, Colorado, for the Respondent.

Michael J. Belo, Esq., of Wheat Ridge, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Denver, Colorado, on October 5, 2000, upon the General Counsel's complaint which alleged that the Respondent refused to deal with a business agent of the Charging Party and thus violated Section 8(a)(5) of the National Labor Relations Act (the Act).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that it was not required to deal with the business agent because he had previously been discharged by the Respondent for having engaged in violent behavior toward a fellow employee and a supervisor.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

The Respondent is a corporation engaged in the operation of retail grocery stores with facilities, among other places, in the Denver, Colorado metropolitan area. During the course and conduct of this business the Respondent annually purchases and receives directly from points outside the State of Colorado, goods, products, and materials valued in excess of \$50,000 and annually derives gross revenues in excess of \$500,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, United Food and Commercial Workers, Local Union 7 (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

For many years, the Union has been the bargaining agent for units of the Respondent's Denver area employees, and the parties have signed successive collective-bargaining agreements, the most recent of which is effective from July 11, 1999, through September 11, 2004.

On March 19, 1996, the Respondent terminated Union Steward George Gonzales, a long-term meat department employee in store 3. The basis of the discharge was the alleged violent and threatening acts by Gonzales toward his supervisor and a fellow employee on March 6, of that year. Gonzales grieved his discharge and the matter was arbitrated, with the arbitrator concluding that in fact he willfully engaged in the acts alleged and that discharge was the appropriate penalty.

In brief, according to the decision of the arbitrator, Gonzales and his supervisor had a dispute over the assignment of Gonzales to work a Saturday (which Gonzales wanted off because it was his 50th birthday). Gonzales became angry and threw a 40-pound chunk of meat against a saw, breaking the blade, threw his meathook over his shoulder (narrowly missing a fellow employee), and threw his knife in a box. He threatened his supervisor, and subsequently, went told by the store manager to leave, he refused to do so. Gonzales took the position then, and in testimony during the instant trial, that the events did not occur as found by the arbitrator. He claims that these acts were accidents, though agreeing to the confrontation over being assigned to Saturday work. The arbitrator also found, though denied by Gonzales, that a few months previously, during a discussion with the store manager while acting as a union steward, Gonzales put his hand over her mouth.

In concluding that the discharge of Gongalez, a 23-year employee, was warranted, the arbitrator "views grievant's behavior as something a good deal more serious than a simple and momentary loss of temper He demonstrated with remarkable clarity that he cannot not [sic] control his temper and that in his loss of control he is capable of seriously endangering the safety of two fellow employees only a few feet from him, as well as his own safety This conclusion is buttressed by the

Where the Board has found that a representative's conduct outside the bargaining process justified a refusal to deal with him, that conduct has been easily distinguishable from Gonzales' single, if dramatic, display of temper. In Sahara Datsun, 278 NLRB 1044 (1986), enfd. 811 F.2d 1217 (9th Cir. 1987), for example, the employee representative disseminated a newsletter to all employees that accused the Respondent's owners of involvement in prostitution and the use and sale of cocaine. He also made unsubstantiated accusations to the Respondent's bank that certain management officials, including officials who could be expected to be involved in bargaining, had engaged in fraudulent financial practices.

fact that grievant lost his temper only a few months earlier in the incident with (the store manager) and (assistant store manager)."

On February 14, 2000, ¹ Gonzales was hired by the Union as a business agent and was assigned to service four of the Respondent's stores (including the one where he had been employed), three Safeway stores and two others.

Stephen J. Dicvoce, the Respondent's director of human resources and labor relations, testified that on learning of this assignment, he conferred with the Respondent's vice president of operations. They determined, based on the arbitrator's decision that the Respondent would not deal with Gonzales. Never before, in his experience, had the Respondent taken such a position.

By letter of March 7, counsel for the Respondent advised the Union's president, Ernest Duran, that "given the nature of the incident resulting in Mr. Gonzales' termination and his history of similar, violent and threatening conduct preceding his termination, King Soopers has determined that Mr. Gonzales is permitted in its stores for the sole purpose of shopping, but not to deal with store management regarding labor relations, grievances, or other union matters."

Duran responded, "Be advised Local 7, not you, has the right to determine who will serve as a Union Representative. Indeed, your assertions are untrue and appear libelous."

There followed a further exchange of letters between the Respondent and Union to like effect and on March 10, the charge in this case was filed. Effective April 17 ("[u]ntil we are successful in winning the grievance to allow George Gonzales back in King Soopers stores") . . . certain changes in business agent assignments were made by the Union such that Gonzales was assigned to 10 Safeway stores and the Safeway meat plant.

B. Analysis and Concluding Findings

The parties agree that as a general rule, a labor organization can designate whomever it wishes to be its agent for purposes of collective bargaining, handling grievances, and related matters. They also agree that in extraordinary circumstances, where the union's designated representative is, or reasonably could be, disruptive to the collective-bargaining process, an employer can refuse to deal with that representative without violating its duty to bargain.

Thus in *Fitzsimmons Mfg. Co.*, 251 NLRB 375 (1980), affd. sub nom. *Auto Workers v. NLRB*, 670 F.2d 663 (6th Cir. 1982), there was a physical confrontation between the union representative with whom the company refused to deal and the company's personal director, during which the union representative grabbed the personal director by the tie, said he would punch him in the face and suggested they go outside and fight. Though the union gave assurances such would not be repeated, the Board concluded that the union agent's "conduct (was) sufficiently egregious to make bargaining impossible" 251 NLRB at 382. The Board quoted the test set forth in *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976): whether there is "persuasive evidence that the presence of the particular

individual would create ill will and make good-faith bargaining impossible." See also *Sahara Datsun*, 278 NLRB 1044 (1986).

A company's burden in refusing to meet with a particular representative of a union is fairly heavy. For instance, in *Long Island Jewish Medical Center*, 296 NLRB 51 (1989), the business agent pushed the hospital's administrator, called her an "asshole" a number of times and momentarily blocked her from her desk. The Judge and Board concluded that these acts were provoked and thus were not sufficiently egregious under the test of *Fitzsimmons* to justify the company refusing to deal with the business agent. See also *People Care*, *Inc.*, 327 NLRB 814 (1999), where insistence on removal of the union's attorney was not justified since there was insufficient evidence that his presence would cause unreasonable hostility.

At the time of his discharge, Gonzales had been an employee of the Respondent for 23 years and had been a union steward of 13 or 14 years, dealing daily with management on a variety of labor issues. Never did the Respondent take the position that his actions as a steward were such that the Respondent would not deal with him. The basis for the Respondent's refusal to deal with him now, as a business agent, is the event which lead to his discharge in 1996, though his "history of similar, violent and threatening conduct" was also cited.

Thus the question here is whether the prior acts of Gonzales, and in particular those for which he was discharged 4 years ago, were sufficiently egregious to justify the Respondent's refusal to deal with him as a business agent servicing its stores. I conclude they were.

There are two factors at work here which, combined, I conclude justify the Respondent's refusal to deal with Gonzales. The first, and most important, is his violent behavior in 1996 arising out of a work related issue. Although Gonzales denied, and continues to deny, that he did anything wrong, must less violent, the Respondent has a reasonable basis to conclude otherwise. Though the recitation of facts in the arbitrator's decision are hearsay, the truth of those facts is not as important as the fact they were found by an independent adjudicator. Based on the arbitrator's decision, the Respondent could certainly conclude that when confronted, Gonzales has the propensity to react violently and could pose a physical danger to others.

As noted above, Gonzales continues to deny the facts leading to his discharge, which the Union apparently supports since Duran wrote that the Respondent's asserted reasons for refusing to deal with Gonzales were "untrue and appear libelous." (Though counsel for the Union represented here that Gonzales "lost his temper.") Thus at no time did the Union or Gonzales give any assurances that such behavior would not reoccur.

Further, I discredit Gonzales. In the spring of 2000, and after this case was filed, Gonzales sought out his former supervisor, Joe Gallegos. According to Gonzales, this was solely for the purpose of consoling Gallegos concerning the events which occurred in 1996. He gave no reason why he had waited 4 years. Gallagos, on the other hand, credibly testified that Gonzales wanted him to tell the human resources directors that Gonzales is not a violent person. While this meeting is of little materiality here, it underscores my conclusion that Gonzales is

¹ All dates are in 2000, unless otherwise indicated.

willing to rearrange facts in a way he perceives will be to his benefit

The fact that Gonzales' outburst happened 4 years ago is of some relevance, but is not dispositive. While somewhat remote in time, the reported actions by Gonzales demonstrate a violent propensity which the Respondent need not be required to be subjected to.

The second factor is necessity. The Union has about 18,000 members working in about 200 retail grocery stores in Colorado and Wyoming, which are serviced by 21 business agents (exclusive of union officers). Eighty of those stores are King Soopers. Fifty-five are Safeway stores, another 40 are Albertsons and the rest are miscellaneous.

Gonzales has no demonstrated expertise which would suggest that the Union's membership would not be as well served if he was assigned to service stores other than King Soopers. He testified that he had 14 years experience in dealing with the King Soopers contract with the Union; however, he also testified (as did others) that after his discharge in 1996, the King Soopers contract was substantially changed.

In short, no persuasive reason was offered why Gonzales need be assigned to any of the Respondent's stores other than that is what the Union wanted. Again, the Union has the generally unfettered right to select which individuals will represent it in various stages of collective bargaining. But where, as here, the Respondent has a reasonable basis for declining to deal with a particular individual and the Union can show no overriding reason for selecting that individual, then the Respondent is justified in its refusal.

Accordingly, I conclude that the Respondent did not violate Section 8(a)(5) in refusing to deal with Gongalez and I shall recommend that the complaint be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The complaint is dismissed in its entirety.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.